82-6597

IN THE SUPREME COURT
OF THE
UNITED STATES

October Term, 1982

No.
Supreme Court, U.S.
FILED
APR 18 1983
Alexander L. Stevas, Clerk

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

RUBEN C. ZARAGOZA,

Petitioner,

- vs. -

STATE OF ARIZONA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE
SUPREME COURT OF THE STATE OF ARIZONA

ROSS P. LEE
Maricopa County Public Defender

MICHAEL G. SULLIVAN
Deputy Public Defender
132 South Central, 2nd Floor
Phoenix, Arizona 85004
Attorney for Petitioner

JOHN FOREMAN
2700 Arizona Bank Building
101 North 1st Avenue
Phoenix, Arizona 85003

QUESTIONS PRESENTED FOR REVIEW

I

Whether, in Petitioner's case, the death sentence imposed was cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

II

Whether, as applied to Petitioner's case, Arizona's statutory basis for imposing the death penalty is unconstitutionally vague or overbroad.

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OPINION BELOW

The unreported Opinion of the Arizona Supreme Court and the Order denying Petitioner's Motion for Rehearing in that Court are attached as Appendix A and Appendix B, respectively.

JURISDICTION

The Opinion of the Arizona Supreme Court affirming Petitioner's conviction and death sentence was rendered on January 10, 1983. The order denying Petitioner's timely Motion for Rehearing was filed on February 18, 1983. The jurisdiction of the Court is invoked under 28 U.S.C. § 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States which provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

and the Fourteenth Amendment to the Constitution of the United States, which provides, in pertinent part:

> "[N] or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

This case also involves the Arizona death penalty statute, A.R.S. § 13-703, which is attached as Appendix C.

STATEMENT OF THE CASE

The Appellant was charged in CR 119984 by an indictment filed on June 2, 1981 with the crime of First Degree Murder, a class one (1) felony. Appellant was arraigned on June 9, 1981 and his trial was initially scheduled for July 28, 1981 before the Honorable Stephen H. Scott, Judge of the Superior Court. On July 14, 1981 the State filed an allegation of prior convictions. They alleged Appellant had been convicted of Aggravated Assault, a felony, on October 17, 1980; of Assault with a Deadly Weapon, a felony, on July 27, 1978; of Petty Theft with a prior

conviction on July 27, 1978; of Burglary Second Degree, a felony, on November 21, 1978; and of Burglary Second Degree, a felony, on November 22, 1967. On that day, Appellant's counsel filed a Motion to Continue and the trial was reset to August 27, 1981. On August 27, 1981 the trial was again continued until September 8, 1981, the last day for trial. At that time, Appellant's counsel filed a Motion to Continue the trial for two (2) weeks. The reason stated was that counsel was in trial in two (2) lower CR number cases. Judge Scott granted the Motion and reset the trial for September 22, 1981.

The Appellant's trial began on September 22, 1981 and continued until September 25, 1981. The State rested its case on that day. In chambers, Appellant's counsel moved for a directed verdict. Judge Scott granted the motion, as it applied to First Degree Murder by Premeditation, but denied it in all other respects. When Court reconvened Appellant's counsel rested his case and the State did not present any rebuttal evidence. Both counsel then gave their arguments and the Court then instructed the jury as to the law applicable to Appellant's case. The alternate jurors were then chose by lot and after admonishing the jury, the Court recessed until September 28, 1981.

On that date, the jury began its deliberations at 9:00 a.m. The jury recessed for one (1) hour for lunch and continued their deliberations at 1:00 p.m. At 2:10 p.m. Court reconvened and the jury returned its verdict. The jury found Appellant guilty of First Degree Murder. At the request of Appellant's counsel, the jury was polled. Judge Scott set the matter for presentence hearing and sentencing on October 26, 1981. The State then moved to dismiss the allegation of prior convictions and the Court granted the motion.

On October 21, 1981 Judge Scott signed an order securing the attendance on October 26, 1981 of Jessie Eugene Davis, an inmate at the Arizona State Prison. On October 26, 1981 Judge Scott held a mitigation hearing of sentencing in CR 119984. Ruben Young, Appellant's probation Officer testified. State's Exhibits #2 and 3 were received in evidence. Officer James Alberts then testified. He was followed to the stand by Eugene Jesse Davis and Officer Walter Hogue. The State then rested. Appellant's counsel then presented his case. Defendant's Exhibit #1, Dr. Jarvis' deposition, was received into evidence over the State's objection. Appellant then rested his case. Both counsel then presented their arguments and

then the Court recessed. When Court reconvened, Judge Scott conducted the sentencing in CR 119984. Judge Scott found the existence of two (2) aggravating circumstances as enumerated in A.R.S. § 13-703(F). He found that Appellant had been previously convicted of a felony in the United States involving the use or threatened violence on another person. Judge Scott also found the Appellant committed the crime in an especially heinous and depraved manner. The Court found that there were no mitigating circumstances in Appellant's case. Judge Scott then sentenced Appellant to death in the manner prescribed by law.

REASONS FOR GRANTING THE WRIT

I

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION OF THE DEATH PENALTY IN THIS CASE VIOLATES THE EIGHTH AMENDMENT'S PROSCRIPTION OF CRUEL AND UNUSUAL PUNISHMENT.

The decision below conflicts with this Court's holdings that the Eighth Amendment bars not only those punishments that are "barbaric" but also those that are "excessive" in relation to the crime committed. Coker v. Georgia, 433 U.S. 584, 592 (1977); see also Enmund v. Florida, _____ U.S. _____, 102 S.Ct. 3368 (1982); Furman v. Georgia, 408 U.S. 238 (1972); Robinson v. California, 370 U.S. 660 (1962); Trop v. Dulles, 356 U.S. 86 (1958); and Weems v. United States, 217 U.S. 349 (1910).

This Court noted in Coker v. Georgia, supra at 592 that:

> . . . Under Gregg, a punishment is "excessive" and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. A punishment might fail the test on either grounds.

In Petitioner's case, he was charged by the State of Arizona with the crime of First Degree Premeditated Murder or in the alterantive with First Degree Felony Murder. The trial court directed a verdict of acquittal on the premeditated portion of the First Degree Murder charge. Based on the instructions given them, the jury found Petitioner guilty of First Degree Murder during the commission of or an attempt to commit a sexual assault.

In discussing the application of the standards mentioned in Gregg v. Georgia,

428 U.S. 153 (1976) this Court stated in Enmund v. Florida, supra at 3377, 3378 that:

> . . . We are quite unconvinced, however, that the threat that the death penalty will be imposed for murder will measurably deter one who does not kill and has no intention or purpose that life will be taken. Instead, it seems likely that "capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation," (citation omitted) for if a person does not intend that life be taken or contemplate that lethal force will be employed by others, the possibility that the death penalty will be imposed for vicarious felony murder will not "enter into the cold calculus that precedes the decision to act." (Citation omitted).
>
> . . . American criminal law has long considered a defendant's intention — and therefore his moral guilt — to be critical to "the degree of [his] criminal culpability" (citation omitted), and the Court has found criminal penalties to be unconstitutionally excessive in the absence of intentional wrongdoing.[1]

This Court further stated in Enmund, with reference to the issue of intent to kill in connection with the crime of robbery, that:

> It would be very different if the likelihood of a killing in the course of a robbery were so substantial that one should share the blame for the killing if he somehow participated in the felony. But competent observers have concluded that there is no basis in experience for the notion that death so frequently occurs in the course of a felony for which killing is not an essential ingredient that the death penalty should be considered as a justifiable deterrent to the felony itself. (Citation omitted).
> 102 S.Ct. at 3378.

Petitioner submits the same general conclusion can be drawn as to death frequently occurring during the commission of the crimes of sexual assault or attempted sexual assault. Also, more specifically, there was no evidence of the use of what could be termed an inherently dangerous weapon in Petitioner's case.

Petitioner therefore submits the reasoning used in Enmund is very applicable to his case. The record below reflects that the State of Arizona failed to prove beyond a reasonable doubt that Petitioner intended to kill the victim. The trial judge directed a verdict of acquittal as to the premeditated charge of First

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[1] In Robinson v. California, supra, a statute marking it illegal to be a narcotics addict was struck down. In Weems v. United States, supra, the Court invalidated a statute making it a crime for a public official to make a false entry in a public record where the statute didn't require the offender to injure anyone by his act or intend to injure anyone. Also, in Godfrey v. Georgia, 446 U.S. 420, 433 (1980) a death sentence was reversed because the defendant's crime did not reflect a "consciousness materially more depraved than that of any person guilty of murder."

Degree Murder. In its opinion affirming Petitioner's conviction and sentence, the Arizona Supreme Court stated:

> . . . There is no evidence that Appellant did not intend to kill the victim. It is reasonable to conclude, in the absence of any evidence to the contrary, that one who beats a 78 year old woman on the head and leaves her bleeding in an alley intends to kill or knows with substantial certainty that his action will cause death.

Besides shifting the burden of proof to Petitioner on the element of intent contrary to Mullaney v. Wilbur, 421 U.S. 684 (1975) this language clearly indicates that the Arizona Supreme Court did not find that the State had proven beyond a reasonable doubt that Petitioner, with his actions, intended to kill.

Under the facts of Petitioner's case, the imposition of the death penalty does not contribute to or meet the standards set forth in Gregg v. Georgia, supra. It can then be classified as being the purposeless and needless imposition of pain and suffering and therefore an unconstitutional punishment. Coker v. Georgia, supra and Enmund v. Florida, supra.

II

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER ARIZONA'S STATUTORY BASIS FOR IMPOSING DEATH HERE IS UNCONSTITUTIONALLY VAGUE OR OVERBROAD.

The Opinion below conflicts with this Court's decisions which hold that if a State wishes to authorize capital punishment, it must channel the sentencer's discretion by "clear and objective standards" that provide "specific and detailed guidance" and that "make rationally reviewable the process of imposing a sentence of death." Godfrey v. Georgia, 446 U.S. 420, 429 (1980) see also Gregg v. Georgia, 428 U.S. 153, 198 (1976); Proffitt v. Florida, 428 U.S. 242, 253 (1976); and Woodson v. North Carolina, 428 U.S. 280, 303 (1976).

In Godfrey v. Georgia, supra, this Court reviewed the affirmance of a death penalty by the Georgia Supreme Court. Under the Georgia Code, a person convicted of first degree murder could be sentenced to death if it was found beyond a reasonable doubt that the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." The Court, in reviewing the Georgia statute stated:

> . . . There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence."
> 446 U.S. at 429.

The Statute in Petitioner's case, A.R.S. § 13-703(F)(6), makes it an aggravating circumstance to be considered by the sentencing judge if "The defendant committed the offense in an especially heinous, cruel or depraved manner." In upholding the death sentence in Petitioner's case, the Arizona Supreme Court in State v. Zaragoza, ____ Ariz. ____, ____ P.2d ____ (1983)(Arizona Supreme Court No. 5432, slip opinion filed January 10, 1983) noted:

> . . . In State v. Knapp, 114 Ariz. 531, 562 P.2d 704 (1977), cert. denied, 435 U.S. 908 (1978), this Court defined the terms used in § 13-703(F)(6). We have applied these definitions consistently ever since Knapp. A murder is "heinous" if it is "hatefully or shockingly evil", it is "cruel" if it is "disposed to inflict pain in a wanton, insensate or vindictive manner" or if "sadistic", it is "depraved" if it is "marked by debasement, corruption, perversion or deterioration" (Citation omitted). In further defining these terms we have held that "cruelty" involves the mental or physical pain inflicted on the victim, while "heinous" and "depraved" involve the mental state and attitude of the killer as reflected in his or her words and actions. (Citations omitted). We recognize that all first degree murders are heinous, cruel, or depraved to a degree. In order to fall within § 13-703(F)(6), however, a murder must be especially heinous, cruel or depraved. (Citations omitted). There must be something about the murder that sets it apart from the norm of first degree murder. (Citations omitted). Slip opinion at pp. 14-15.

Petitioner challenged the constitutionality of Arizona's death penalty statute, and the application of that statute in the imposition of the sentence of death. Petitioner submits that the issue of the constitutionality of the Arizona death penalty statute as it was applied in his case is a valid issue which has not been decided by this Court. A similar situation was presented in Proffitt v. Wainwright, 685 F.2d 1227 (1982). In ruling on this question, the United States Court of Appeals stated:

> The aggravating factors challenged by appellant here were upheld by the Supreme Court as facially valid on appellant's direct appeal. (Citation omitted). The Court did not rule on the constitutionality of the provision as applied in this case, however; hence the issue is properly before this Court. . . the issue we must decide is essentially a procedural one: whether the construction of the eighth statutory aggravating factor evinced by the trial court's application of it to the facts of this case comports with the eighth amendment requirement that death sentences be based on clear, detailed and rationally reviewable standards (Citation omitted). 685 F.2d at 1263.

The position of the Arizona Supreme Court is that A.R.S. § 13-703(F)(6) is not unconstitutionally vague. State v. Gretzler, ____ Ariz. ____, ____ P.2d ____, Arizona Supreme Court No. 3750-2 (slip opinion filed January 6, 1983);

State v. Ortiz, 131 Ariz. 195, 639 P.2d 1020 (1981). Also, the court has found it appropriate to define these terms further. State v. Knapp, supra. In the recent case of People v. Superior Court of Santa Clara County, 647 P.2d 76 (Cal. 1982) the defendant's challenged the special circumstance allegations that the murders were "especially heinous, atrocious, and cruel, manifesting exceptional depravity" as described in California Penal Code, § 190.2(a)(14). In discussing this section the California Supreme Court stated:

> . . . The terms address the emotions and subjective, idiosyncratic values. While they stimulate feelings of repugnance, they have no directive content. The adverb "especially" adds nothing except greater uncertainty. The term "especial" is defined by Webster as "[n]ot general; distinguished among others of the same class as exceptional in degree."
>
> None of these terms meets the standards of precision and certainty required of statutes which render persons eligible for punishment, either as elements of a charged crime or as a charged special circumstance.
> 647 P.2d at 78.

Petitioner submits that the Arizona death penalty statute, as it has been interpreted and applied by the Arizona Supreme Court, creates a substantial risk that the Arizona capital-sentence system will result in the arbitrary or capricious imposition of the death penalty. The additional definitions provided by the Arizona Supreme Court do nothing but cause confusion in aiding the trial court in determining whether the aggravating circumstance in A.R.S. § 13-703(F)(6) exists. In Petitioner's case, the trial court found that the offense was committed in an especially heinous and depraved manner. In discussing the reasons for this finding, the trial court termed the offense a senseless killing. Senseless is not one of the terms used by the Arizona death penalty statute or by the Arizona Supreme Court in its interpretation of the statute. As indicated previously, the trial court found that the State did not prove beyond a reasonable doubt that Petitioner was guilty of premeditated murder. Petitioner submits that the trial court's findings that the crime was committed in an especially heinous and depraved manner, as upheld by the Arizona Supreme Court, are not supported by the facts of his case when compared to other cases.[2]

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[2] Proffit v. Wainwright, 685 F.2d 1227, 1263-1264 (1982) (discussion of how a similar provision in Florida's death penalty statute has been construed.)
Godfrey v. Georgia, 446 U.S. 420. Defendant shot his wife and mother-in-law in head with a shotgun he had retrieved after a quarrel.
State v. Pritchett, 621 S.W.2d 127 (Tenn. 1981) victim shot twice with a pump shotgun.
State v. Culberth, 390 So.2d 847 (La. 1980) victim stabbed repeatedly and died on the way to the hospital.

The action of the Arizona Supreme Court in affirming Petitioner's death sentence is unconstitutional because; (1) the statute does not channel the sentencing court's discretion with clear and objective standards that provide specific and detailed guidance and (2) the court's opinion does not make the imposition of the death sentence in Petitioner's case rationally reviewable.

CONCLUSION

For the reasons stated herein, the writ of certiorari to the Arizona Supreme Court should be granted.

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF ARIZONA
In Banc

FILED
JAN 10 1983
CLERK SUPREME COURT
BY

STATE OF ARIZONA,
Appellee,
v.
RUBEN C. ZARAGOZA,
Appellant.

No. 5432

PUBLIC DEFENDER
JAN 12 1983
APPEALS
RECEIVED

Appeal from the Superior Court of Maricopa County
Cause Nos. CR-119984 and CR-115197 (Consolidated)
The Honorable Stephen H. Scott, Judge
Affirmed

Robert K. Corbin — Phoenix
Attorney General

William J. Schafer III — Phoenix
Chief Counsel, Criminal Division

David R. Cole — Phoenix
Assistant Attorney General

Attorneys for Appellee

Ross P. Lee — Phoenix
Maricopa County Public Defender

Michael G. Sullivan — Phoenix
Deputy Public Defender

Attorneys for Appellant

GORDON, Vice Chief Justice:

On September 28, 1981, a jury found appellant guilty of first degree murder in violation of A.R.S. § 13-1105(A)(2). An aggravation-mitigation hearing was set for October 26, 1981. Because appellant was on probation for a prior aggravated assault conviction at the time of the murder the disposition hearing in connection with the probation revocation was also set for October 26, 1981. At the hearing on October 26 the trial court revoked appellant's probation and sentenced him to 1.875 years in prison for aggravated assault. The court then sentenced appellant to death for the first degree murder. Appellant now challenges the conviction and sentence for murder and the revocation of probation and sentence for aggravated assault. We have jurisdiction to review the conviction of murder and death sentence under Ariz. Const. Art. 6, § 5(3) and A.R.S. § 13-4031. We have jurisdiction to review the revocation of probation and sentence for aggravated assault under Ariz. R. Sup. Ct. 47(e)(5). We affirm.

Winifred Duggan, the victim in this case, was a seventy-eight year old woman. A lobotomy had been performed on her sometime in the 1930's and she had limited mental capabilities and was easy to manipulate.

At about 8:30 or 8:45 on the evening of May 26, 1981, appellant and Winifred Duggan were seen in a liquor store near Sixth Avenue and Van Buren in Phoenix. Winifred appeared to be unaware of where

she was and appellant was controlling her. Appellant had Winifred's purse and refused to give it to her when she reached for it. Appellant took money out of the purse and bought a can of beer and a pint bottle of white port wine. They then left the store.

Some time between 9:00 and 10:00 that same evening appellant and Winifred approached some people who were drinking beer on the porch of their apartments on Sixth Avenue. Winifred appeared to be nervous or scared and appellant spoke for her whenever she was spoken to. Appellant and Winifred remained there for 15 to 20 minutes. During that time both of them were seen drinking beer.

At 11:10 that night appellant was seen in the alley behind the same apartments on Sixth Avenue. He climbed up on a metal utility box and pulled some clothes off the top of the building across the alley from the apartments. He then threw several objects onto the roof of that building.

The following morning Winifred Duggan's body was found in the alley a short distance from the apartments. The body was naked except for a bra, which had been pushed up exposing her breasts, and a pair of sandals. Winifred Duggan had several head wounds caused by blows from some blunt object. She bled to death as a result of those wounds. She also had a bruise at the back edge of her vagina that was consistent with penetration by a penis or finger. A foreign pubic hair that matched appellant's was found meshed with the victim's own pubic hair.

Police officers found some bloody clothes, two bloody beer bottles and a bloody white port wine bottle on the roof of the

building across from the apartments on Sixth Avenue. The bottles also had some white hair stuck to them, and some identifiable latent fingerprints on them. The blood and hair on the bottles matched the victim's and the prints matched appellant's. Appellant's fingerprint was also found on one of three bloody paper bags found near the body.

Appellant was arrested later that morning. He admitted having been with the victim the night before but denied killing her. He was charged with first degree premeditated murder and first degree felony murder alleging that he killed the victim while committing or attempting to commit robbery or sexual assault. At the close of the evidence at trial, the court directed a verdict of acquittal on the premeditated murder charge.

Appellant raises five issues on appeal: (1) whether the trial court erred in failing to instruct the jury on the crime of attempted sexual assault; (2) whether the prosecutor's closing argument was improper; (3) whether Arizona's death penalty statute is unconstitutional; (4) whether the death penalty was properly imposed in this case; and (5) whether the revocation of probation and sentence for aggravated assault was proper.

Failure to Instruct on Attempted Sexual Assault

At appellant's trial the jury was instructed as follows:

> "The crime of first degree murder requires proof of the following two things: One, the defendant committed or attempted to commit sexual assault, and, two, in the course of and in furtherance of the crime or immediate flight

from the crime, the defendant caused the death of Winifred Duggan.

"The crime of sexual assault requires proof of the following two things: One, the defendant intentionally or knowingly penetrated the vulva of Winifred Duggan with a part of his body without Winifred Duggan's consent, and, two, Winifred Duggan was not legally married to the defendant."

These instructions and the order in which they were given conformed perfectly with Recommended Arizona Jury Instructions. See RAJI 11.052 & nn.1-2; RAJI 14.06. Appellant did not request an instruction defining attempted sexual assault and none was given. Furthermore, appellant did not object to the instructions as given. He now claims that the trial court's failure to instruct the jury on the offense of attempted sexual assault was error requiring reversal.

The United States Supreme Court has stated, "[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." Henderson v. Kibbe, 431 U.S. 145, 154, 97 S.Ct. 1730, 1736, 52 L.Ed.2d 203, 212 (1977). If a defendant does not object to a trial court's failure to give an instruction then the defendant may not claim error on appeal unless the failure to instruct rises to the level of fundamental error. State v. Mincey, 130 Ariz. 389,

636 P.2d 637 (1981), cert. denied, ____U.S. ____, 102 S.Ct. 1638 (1982); State v. Dippre, 121 Ariz. 596, 592 P.2d 1252 (1979); Ariz. R. Crim. P. 21.3(c). Error is fundamental only if it "goes to the foundation of the case, or * * * takes from a defendant a right essential to his defense." State v. Mincey, 130 Ariz. at 397, 636 P.2d at 645 (quoting State v. Pulliam, 87 Ariz. 216, 222, 349 P.2d 781, 785 (1960)).

In the instant case appellant was accused of first degree murder in violation of A.R.S. § 13-1105(A)(2). Section 13-1105 (A)(2) provides that one commits first degree murder if one "commits or attempts to commit sexual assault," or other enumerated felonies, and a death is caused.[1/] The substance of appellant's argument is that the word "attempts" in § 13-1105(A)(2) means "commits attempt" as defined in A.R.S. § 13-1001. Because the jury was not instructed

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1/ The indictment also accused appellant of premeditated murder and of killing the victim while committing or attempting to commit robbery. The trial judge directed a verdict of acquittal on the charge of premeditated murder and did not submit robbery-felony murder to the jury.

on § 13-1001 attempt, the argument continues, it was unable to properly determine whether appellant killed the victim while attempting to commit sexual assault. Furthermore, because of the form of the verdict in this case it is not clear whether the jury found a completed sexual assault or merely an attempt. Consequently, appellant concludes, it is possible that the jury found that appellant killed the victim while attempting to commit sexual assault based on an inaccurate understanding of the word "attempt."

It is not immediately apparent from the language of § 13-1105 (A)(2) whether the word "attempts" is being used in its ordinary sense or in its § 13-1001 sense. For purposes of the instant case we need not decide. Assuming without deciding that "attempts" is used in its § 13-1001 sense, the failure to instruct on attempt in the instant case was not fundamental error. This is because the ordinary definition of "attempt" and the § 13-1001 definition of "attempt," as applied to this case, are essentially the same. A common definition of attempt is "to make an effort to do, accomplish" something. Webster's Third International Dictionary 140 (1976); see State v. Wilson, 120 Ariz. 72, 74, 584 P.2d 53, 55 (App. 1978) ("the word 'attempt' means to try; it implies an effort to bring about a desired result"). Under A.R.S. § 13-1001 "attempt" means to do any act toward the commission of a particular crime coupled with the intent to complete the crime. State v. Dale, 121 Ariz. 433, 590 P.2d 1379 (1979). It is difficult to see how something could be an attempt under one definition and not the other. Consequently, this case did not involve "error going to the foundation of the case" nor was

appellant "denied a right essential to his defense " by virtue of the fact that the jury was working with the ordinary definition of "attempt" rather than the § 13-1001 definition. There is no danger that the jury found that appellant killed the victim while attempting sexual assault based on an inaccurate definition of the word "attempt." See State v. King, 110 Ariz. 36, 514 P.2d 1032 (1973); State v. McAlvain, 104 Ariz. 445, 454 P.2d 987 (1969); People v. Nelson, 73 Ill. App. 3d 593, 392 N.E.2d 602 (1979); People v. Thomas, 49 Ill. App.3d 747, 364 N.E.2d 641 (1977); People v. Miner, 46 Ill. App.3d 273, 360 N.E.2d 1141 (1977); cf. Rizzuto v. State, 407 A.2d 225 (Del. 1979) (failure to define "sexual contact," which is specifically defined by statute, is not error because it has common meaning that is tracked in the statute).

Even if the trial court's failure to define attempt had been fundamental error it would have been harmless in the instant case. Error is harmless if there is no reasonable probability under the facts of the case that the verdict might have been different had the error not been committed. State v. Malloy, 131 Ariz. 125, 639 P.2d 315 (1982). There can be no serious doubt that the victim in the instant case was killed in the course of a sexual assault or an attempted sexual assault.[2/] The evidence showed that the victim's body was found

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2/ A person commits sexual assault by knowingly or intentionally engaging in sexual intercourse with any person not his or her spouse without that person's consent. A.R.S. § 13-1406. "Sexual intercourse" is defined as "penetration into the penis, vulva or anus

naked except for her bra, which had been pushed up exposing her breasts, and her sandals. There was a foreign pubic hair meshed with the victims as if the attacker's pubic area had been mounted on top of the victim's. Moreover, there was a bruise on the back edge of the victim's vagina. Testimony established that the bruise was caused within minutes of the fatal head injuries and that it was consistent with penetration by a penis or finger. This uncontroverted evidence, at the very least, established that the victim was killed in the course of an attempted sexual assault, and indicated quite strongly that she was killed in the course of a completed sexual assault. It appears from the record that the only seriously contested issue in this case was not whether the victim was killed in the course of an attempted or completed sexual assault, but whether appellant was the person who killed her. There is no reasonable probability that the giving of an attempt instruction would have caused the jury to find that the victim was not killed in the course of an attempted or completed sexual assault and thereby acquit appellant. See State v. McAlvain, supra; People v. Welch, 8 Cal.3d 106, 501 P.2d 225, 104 Cal. Rptr. 217 (1972); cf. Rizzuto v. State, supra (failure to define "sexual contact," which is specifically defined by statute,

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2/ (Continued from previous page):
by any part of the body or by any object or manual masturbatory contact with the penis or vulva." A.R.S. § 13-1401(3). A person commits attempted sexual assault by doing any act that is a step toward committing a sexual assault with the intent to complete the offense. See State v. Wallen, 114 Ariz. 355, 560 P.2d 1262 (App. 1977).

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did not prejudice defendant because it has an ordinary meaning that is tracked by the statute); People v. McGhee, 67 Mich. App. 12, 239 N.W.2d 741 (1976) (failure to instruct on underlying felony is not error where there is no doubt that killing occurred in course of felony); People v. Jones, 66 Mich.App. 223, 238 N.W.2d 813 (1975) (failure to instruct on underlying felony is not error where there is no doubt that killing occurred in course of felony).

Prosecutor's Closing Argument

In his rebuttal closing argument the prosecutor stated:

> "Now, the defense attorney told you that the victim did not deserve to die, and referred to it as a tragic occurrence, but it was more than that. It was a brutal and senseless killing in which the defendant smashed in the head of a 78-year old lady and left her to bleed to death, as the doctor told you, in the alley. That's first degree murder from an emotional point of view and a logical point of view."

Appellant did not object to this statement at his trial but argues on appeal that it was reversible error.

Appellant's failure to object during the closing argument constitutes a waiver of any right to review on appeal unless the prosecutor's statement amounts to fundamental error. State v. Mincey, supra; State v. Marvin, 124 Ariz. 555, 606 P.2d 406 (1980).

We find that the statement objected to by appellant in the instant case was not improper and certainly not fundamental error.

Wide latitude is given in closing arguments and counsel may comment on the evidence and argue all reasonable inferences therefrom. State v. Mincey, supra; State v. Blazak, 114 Ariz. 199, 560 P.2d 54 (1977) (quoting State v. Gonzales, 105 Ariz. 434, 466 P.2d 388 (1970)). Counsel may not, however, comment on matters which were not introduced in evidence. State v. Smith, 114 Ariz. 415, 561 P.2d 739 (1977). The prosecutor's statement in this case involved nothing more than the circumstances of the killing, all of which were in evidence. It did not call matters to the attention of the jury that the jury could not properly consider. Moreover, while it may be argued that the statement had emotional overtones, some amount of emotion in closing argument is not only permissible, it is to be expected. State v. Marvin, supra; State v. Blazak, supra; State v. Smith, supra; State v. Freeman, 114 Ariz. 32, 559 P.2d 152 (1976); State v. Nelson, 131 Ariz. 150, 639 P.2d 340 (App. 1981).

Constitutionality of Arizona's Death Penalty Statute

Appellant claims that A.R.S. § 13-703(F)(6), which allows the trial court to consider whether a murder was committed in an "especially heinous, cruel, or depraved manner" as an aggravating circumstance, is unconstitutionally vague. In State v. Gretzler, ___Ariz. ___, ___P.2d ___, No. 3750-2 (filed January 6, 1983). and State v. Ortiz, 131 Ariz. 195, 639 P.2d 1020 (1981), we considered this argument and rejected it.

Appellant also claims that A.R.S. § 13-703 is unconstitutional because it does not allow the sentencing judge to consider the defendant's mens rea at the time of the crime as a mitigating circumstance in sentencing. This claim is without merit.

As the United States Supreme Court made clear in Bell v. Ohio, 438 U.S. 637, 98 S.Ct. 2977, 57 L.Ed.2d 1010 (1978), and Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and as this court made clear in State v. Watson, 120 Ariz. 441, 586 P.2d 1253, cert. denied, 440 U.S. 924 (1978), a death penalty statute may not preclude the sentencer from considering, as mitigating circumstances, any aspects of a defendant's character or record and any circumstances of the offense relevant in determining whether a sentence less severe than death is appropriate. A.R.S. § 13-703 is entirely consistent with this requirement. Section 13-703(G) provides:

> "Mitigating circumstances shall be any factors proffered by the defendant or the state which are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense * * *."

The language of this provision clearly allows the defense or the prosecution to offer and the sentencing judge to consider any mitigating circumstance relevant to the sentencing decision.

This includes the defendant's mens rea. Furthermore, it is clear from the record that at the sentencing hearing appellant raised and the sentencing judge considered the question of appellant's mens rea at the time of the crime. A.R.S. § 13-703(G) is not unconstitutional.

Imposition of the Death Penalty in the Instant Case

Appellant claims that the death penalty should not have been imposed in this case. We review every death penalty imposed in the State of Arizona to insure that it is applied with consistency and not in an arbitrary or capricious manner. Our duty is not simply to determine whether the trial court's finding is supported by sufficient evidence. Rather, we must make a separate and independent determination as to whether, based on the record before us, the death penalty should be imposed. State v. Schad, 129 Ariz. 557, 633 P.2d 366 (1981), cert. denied, ___U.S. ___, 102 S.Ct. 1492 (1982); State v. Watson, 129 Ariz. 60, 628 P.2d 943 (1981).

The death penalty is reserved for first degree murders in which either the circumstances of the killing are so shocking that it stands out above the norm of first degree murders, or the background of the murderer sets him apart from the usual first degree murderer. State v. Blazak, 131 Ariz. 598, 643 P.2d 694 (1982); State v. Watson, supra. This notion is embodied in Arizona's death penalty statute, A.R.S. § 13-703. Under § 13-703(E) if a case involves one or more of seven enumerated aggravating

circumstances and no mitigating circumstances sufficiently substantial to call for leniency then the trial court is required to impose a sentence of death.

In the instant case the trial court found two aggravating circumstances and no mitigating circumstances. The court found, under § 13-703(F)(2), that appellant has previously been convicted of two other felonies involving the use or threat of violence on another person. We too find the existence of that aggravating circumstance. Appellant was convicted of assault with a deadly weapon in 1978, and aggravated assault in 1980. Both offenses involved the actual use of violence on another person.

The trial court also found under § 13-703(F)(6), that the killing was committed in an especially heinous or depraved manner. So do we.

A.R.S. § 13-703(F)(6) provides that the sentencing judge shall consider as an aggravating circumstance that "[t]he defendant committed the offense in an especially heinous, cruel, or depraved manner." In State v. Knapp, 114 Ariz. 531, 562 P.2d 704 (1977), cert. denied, 435 U.S. 908 (1978), this Court defined the terms used in § 13-703(F)(6). We have applied these definitions consistently ever since Knapp. A murder is "heinous" if it is "hatefully or shockingly evil"; it is "cruel" if it is "disposed to inflict pain in a wanton, insensate or vindictive manner" or if "sadistic"; it is "depraved" if it is "marked by debasement, corruption, perversion or deterioration." State v. Knapp, 114 Ariz. at 543, 562

P.2d at 716. In further defining these terms we have held that "cruelty" involves the mental or physical pain inflicted on the victim, while "heinous" and "depraved" involve the mental state and attitude of the killer as reflected in his or her words and actions. State v. Poland, 132 Ariz. 269, 645 P.2d 784 (1982); State v. Bishop, 127 Ariz. 531, 622 P.2d 478 (1981); State v. Clark, 126 Ariz. 428, 616 P.2d 888, cert. denied, 449 U.S. 1067 (1980); State v. Ceja, 126 Ariz. 35, 612 P.2d 491 (1980); State v. Lujan, 124 Ariz. 365, 604 P.2d 629 (1979). We recognize that all first degree murders are heinous, cruel, or depraved to a degree. In order to fall within § 13-703(F)(6), however, a murder must be especially heinous, cruel, or depraved. State v. Ortiz, supra; State v. Lujan, supra. There must be something about the murder that sets it apart from the norm of first degree murder. State v. Lujan, supra; State v. Brookover, 124 Ariz. 38, 601 P.2d 1322 (1979).

In the instant case the trial court found that the murder was not cruel. We agree. The deputy medical examiner who performed the autopsy on the victim testified that she bled to death from head injuries caused by blows from blunt objects. He could not, however, determine whether she was conscious at the time she received any of the blows. There was no evidence to indicate that the victim suffered great pain. Consequently, we cannot find that the killing was especially cruel. State v. Ortiz, supra; State v. Ceja, supra; State v. Clark, supra.

The trial court did find that the killing was especially heinous or depraved. We agree. The victim in this case was 78 years old. She had limited mental capabilities and was easily manipulated. She was helpless at the hands of appellant. He could have accomplished whatever criminal goals he desired without killing her. Furthermore, it is clear that appellant was aware of these facts. The way he treated her in the liquor store and while they were at the apartments on Sixth Avenue demonstrates this. We find that by sexually assaulting Winifred Duggan and senselessly killing her, knowing full well that by virtue of her advanced age and limited mental capabilities she was easy prey, appellant demonstrated a shockingly evil and corrupt state of mind. Consequently, we find that the murder in the instant case was heinous and depraved within the meaning of A.R.S. § 13-703(F)(6). See State v. Woratzeck, ___Ariz. ___, ___P.2d ___, No. 5142 (filed Dec. 17, 1982) (Gordon, V.C.J., concurring in part and dissenting in part); State v. Tison, 129 Ariz. 526, 633 P.2d 335 (1981); cf. Quince v. State, 414 So.2d 185, 187 (Fla. 1982) ("beating, wounding, raping, and manual strangulation of an eighty-two year old, frail woman easily qualified as heinous"). We find therefore that there are two aggravating circumstances present in this case. Appellant has previously been convicted of two felonies involving threats or violence on another, and he committed the murder in the instant case in a heinous and depraved manner.

We now address the question of mitigating circumstances. Under A.R.S. § 13-703(G) any factor relevant in determining whether to impose a sentence less than death is a mitigating circumstance.

If a defendant introduces uncontroverted credible evidence tending to prove a mitigating circumstance then the mitigating circumstance exists. Once the existence of one or more mitigating circumstances is established, the court must determine whether they are sufficiently substantial to call for leniency.

Appellant argues, as he did in the trial court, that there are several mitigating circumstances present in the instant case. First, appellant argues that the giving of a felony murder instruction is a mitigating circumstance. We have held that the giving of a felony murder instruction may be considered as a mitigating circumstance. State v. Schad, supra. In order to be a mitigating circumstance, however, it must somehow be relevant in determining whether the death penalty should be imposed. The fact that a case goes to the jury on a felony murder theory rather than a premeditated murder theory is not relevant to that determination in a case where the defendant intended to kill the victim or where the defendant knew with substantial certainty that his conduct would cause death. See State v. Schad, supra; State v. Jordan, 126 Ariz. 283, 614 P.2d 825 (1980).

Turning to the case at issue, the evidence establishes that appellant repeatedly hit the victim on the head and left her bleeding in the alley. There is no evidence that appellant did not intend to kill the victim. It is reasonable to conclude, in the absence of any evidence to the contrary, that one who beats a 78 year old woman on the head and leaves her bleeding in an

alley intends to kill or knows with substantial certainty that his action will cause death. See State v. Schad, supra; State v. Jordan, supra. Consequently, we find that the giving of the felony murder instruction was not relevant in determining whether appellant should receive a death sentence and therefore is not a mitigating circumstance.

Appellant also argues that the trial court found that he did not intend to kill the victim and that that is a mitigating circumstance. Appellant bases this argument solely on the fact that the trial judge directed a verdict of acquittal on the charge of premeditated first degree murder. Appellant's argument is without merit. It is clear from the record that the trial court directed a verdict of acquital on the premeditated murder charge only because the state failed to prove premeditation. The court did not find that appellant did not intend to kill the victim. Appellant has not established lack of intent as a mitigating circumstance.

Next, appellant argues that he was an alcoholic and "probably intoxicated" at the time of the killing and that that is a mitigating circumstance. A defendant's intoxication or alcoholism at the time of the offense is a mitigating circumstance if the evidence shows that it significantly impaired the defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law. State v. Britson, 130 Ariz. 380, 636 P.2d 628 (1981); State v. Jordan, supra; see State v. Smith, 125 Ariz. 412, 610 P.2d 46 (1980). The evidence offered by appellant in the instant case falls far short of this showing.

The evidence shows that appellant bought a pint of white port wine and a can of beer at about 8:30 or 8:45 the evening of the killing, that appellant and the victim were seen drinking beer some time between 9:00 and 10:00 that evening, and that the victim's blood alcohol level was .02. At best, this evidence suggests that on the evening of the killing appellant drank the better part of a pint of wine and a can of beer. It does not begin to establish that appellant was intoxicated or that his capacity to appreciate the wrongfulness of his conduct was impaired. Furthermore, there is evidence to suggest that appellant's capacity was not impaired. On the night of the murder a witness saw appellant climb up on a utility box and use a rake to pull some clothing off of a nearby roof. The witness then saw appellant throw what turned out to be two bloody beer bottles and a bloody wine bottle onto the roof. The fact that appellant tried to dispose of evidence or instrumentalities of the crime suggests that he did appreciate the wrongfulness of his conduct.

We have reviewed the remaining factors appellant relies on and we find that they are not mitigating circumstances. After conducting our independent examination of the record we find the existence of two aggravating circumstances, no mitigating circumstances, and certainly no mitigating circumstances sufficiently substantial to call for leniency. Furthermore, we have reviewed prior cases and find that a sentence of death in this case is not excessive or disproportionate to penalties imposed in other

cases in which defendants with histories of violent criminal behavior have been convicted of first degree felony murder. See State v. Greenwalt, 128 Ariz. 150, 624 P.2d 828 (1981); State v. Steelman, 126 Ariz. 19, 612 P.2d 475 (1980); State v. Jordan, supra; State v. Arnett, 125 Ariz. 201, 608 P.2d 778 (1980); State v. Evans, 124 Ariz. 526, 606 P.2d 16 (1980). Consequently, we find the death penalty appropriate in this case.

Probation Revocation

Appellant claims that because his conviction should be reversed the order revoking his probation and imposing sentence in connection with his prior aggravated assault conviction should be vacated. Because we affirm appellant's conviction we also affirm the trial court's revocation of probation and sentence.

We have examined the record for fundamental error and find none.

The judgment of conviction and sentence for first degree murder is affirmed. The revocation of probation and sentence for aggravated assault is affirmed.

FRANK X. GORDON, JR., Vice Chief Justice

CONCURRING:

WILLIAM A. HOLOHAN, Chief Justice

JACK D. H. HAYS, Justice

JAMES DUKE CAMERON, Justice

STANLEY G. FELDMAN, Justice

APPENDIX B

Supreme Court
STATE OF ARIZONA
201 WEST WING
CAPITOL BUILDING
(602) 255-4536
Phoenix 85007

S. ALAN COOK
CLERK

ANNA L. CATES
CHIEF DEPUTY CLERK

PUBLIC DEFENDER
FEB 23 1983
APPEALS
RECEIVED

February 18, 1983

STATE OF ARIZONA, Appellee, vs. RUBEN C. ZARAGOZA, Appellant.	Supreme Court No. 5432 Court of Appeals No. 1 CA-CR 5735 Maricopa County Nos. CR-119984 and CR-115197 (Consolidated)

The following action was taken by the Supreme Court of the State of Arizona on February 16, 1983 in regard to the above-entitled cause:

"ORDERED: Motion for Rehearing - DENIED."

Copy of Order Affirming Conviction, Sentences and Revocation of Probation enclosed herewith.

S. ALAN COOK, Clerk
By Michael R. Bruno
Deputy Clerk

TO:
Ross P. Lee, Maricopa County Public Defender, 132 South Central, 2nd Floor, Phoenix, Arizona 85004 Attn: Michael G. Sullivan
Hon. Robert K. Corbin, Attorney General, 1275 West Washington, Phoenix, Arizona 85007 Attn: William J. Schafer III and David R. Cole
Thomas E. Collins, Maricopa County Attorney, 101 West Jefferson, Phoenix, Arizona 85003
Ruben C. Zaragoza, Box B-33495, Arizona State Prison, Florence, Arizona 85232

Supreme court will not reduce sentence imposed by the trial court unless it clearly appears excessive under the circumstances, resulting in an abuse of discretion. State v. McGuire (App.1981) 131 Ariz. 109, 638 P.2d 1339.

Fact that defendant appears in person before trial judge renders such judge in most instances more able than the supreme court to evaluate defendant and his circumstances regarding sentence imposed. State v. Ferreira (1981) 128 Ariz. 530, 627 P.2d 681.

Imposition of penalty upon conviction of crime is entirely within discretion of trial judge and the supreme court will not reduce such penalty unless it clearly appears that sentence imposed is excessive and is result of abuse of discretion. Id.

Sentence within statutory limits will not be disturbed on appeal unless it is clearly excessive and reveals an abuse of discretion; abuse of discretion is characterized by arbitrariness or capriciousness, and failure to adequately take into account circumstances of offense and past conduct and moral character of defendant. State v. Limpus (App.1981) 128 Ariz. 371, 625 P.2d 960.

Court of appeals will not modify sentence unless there are unusual circumstances or it clearly appears from record that there is abuse of discretion. State v. Scrivner (App.1979) 125 Ariz. 508, 611 P.2d 95.

Where record revealed no abuse of discretion by sentencing court, sentence within statutory limits will not be overturned on appeal. State v. Baumann (1980) 125 Ariz. 404, 610 P.2d 38.

Exercise of court's wide discretion in passing sentence will be upheld as long as it is within statutory limits and there is no clear abuse of discretion. State v. Whitehead (1979) 122 Ariz. 535, 596 P.2d 370.

Penalty imposed by trial court upon conviction will not be reduced unless it clearly appears that sentence imposed is excessive, resulting in an abuse of trial court's discretion. State v. Jerousek (1979) 121 Ariz. 420, 590 P.2d 1366.

Court of appeals exercises its power to reduce sentence only when it clearly appears that sentence is excessive. State v. Montano (App.1978) 121 Ariz. 147, 589 P.2d 21.

Supreme Court will reduce sentence if it clearly appears that sentence is too severe, or that trial judge abused his discretion in determining penalty. State v. Herrera (1978) 121 Ariz. 12, 588 P.2d 305, certiorari denied 99 S.Ct. 2175, 441 U.S. 949, 60 L.Ed.2d 1054.

§ 13-703. Sentence of death or life imprisonment without possibility of parole until the defendant has served twenty-five calendar years

A. A person guilty of first degree murder as defined in § 13-1105 shall suffer death or imprisonment in the custody of the department of corrections for life, without possibility of parole until the completion of the service of twenty-five calendar years, as determined and in accordance with the procedures provided in subsections B through G of this section.

B. When a defendant is found guilty of or pleads guilty to first degree murder as defined in § 13-1105, the judge who presided at the trial or before whom the guilty plea was entered, or any other judge in the event of the death, resignation, incapacity or disqualification of the judge who presided at trial or before whom the guilty plea was entered, shall conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances included in subsections F and G of this section, for the purpose of determining the sentence to be imposed. The hearing shall be conducted before the court alone.

C. In the sentencing hearing the court shall disclose to the defendant or defendant's counsel all material contained in any presentence report, if one has been prepared, except such material as the court determines is required to be withheld for the protection of human life. Any presentence information withheld from the defendant shall not be considered in determining the existence or nonexistence of the circumstances included in subsection F or G of this section. Any information relevant to any mitigating circumstances included in subsection G of this section may be presented by either the prosecution or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials; but the admissibility of information relevant to any of the aggravating circumstances set forth in subsection F of this section shall be governed by the rules governing the admission of evidence at criminal trials. Evidence admitted at the trial, relating to such aggravating or mitigating circumstances, shall be considered without reintroducing it at the sentencing proceeding. The prosecution and the defendant shall be permitted to rebut any information received at the hearing and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the circumstances included in subsections F and G of this section. The burden of establishing the existence of any of the circumstances set forth in subsection F of this section is on the prosecution. The burden of establishing the existence of the circumstances included in subsection G of this section is on the defendant.

D. The court shall return a special verdict setting forth its findings as to the existence or nonexistence of each of the circumstances set forth in subsection F of this section and as to the existence of any of the circumstances included in subsection G of this section.

E. In determining whether to impose a sentence of death or life imprisonment without possibility of parole until the defendant has served twenty-five calendar years, the court shall take into account the aggravating and mitigating circumstances included in subsections F and G of this section and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection F of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency.

F. Aggravating circumstances to be considered shall be the following:

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.

3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense.

4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

6. The defendant committed the offense in an especially heinous, cruel or depraved manner.

7. The defendant committed the offense while in the custody of the department of corrections, a law enforcement agency or county or city jail.

G. Mitigating circumstances shall be any factors proffered by the defendant or the state which are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense, including but not limited to the following:

1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.

2. The defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution.

3. The defendant was legally accountable for the conduct of another under the provisions of § 13-303, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.

4. The defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person.

5. The defendant's age.

Amended by Laws 1979, Ch. 144, § 1, eff. May 1, 1979; Laws 1982, Ch. 226, § 2; Laws 1982, Ch. 325, § 5.

Laws 1982, Ch. 325, which, inter alia, amended this section, was repealed by Laws 1982, 6th S.S., Ch. 3, § 1.

Law Review Commentaries

Capital punishment. Ariz.State L.J. 4, 1977, p. 797.

Constitutionality of Arizona death penalty statute. 19 Ariz.L.Rev. 504 (1977).

Death penalty. Ariz.State L.J. 2-3, 1978, p. 285.

Death penalty: Social policy and social justice. Ariz.State L.J. 4, 1977, p. 767.

Death penalty statute, reconstruction under Watson. 22 Ariz.L.Rev. p. 1037 (1980).

Speedy trial, denial upon resentencing to death. Ariz. State L.J. 1, 1979, p. 137.

United States Supreme Court

Capital sentencing scheme. Requirements, see Godfrey v. Georgia, 1980, 100 S.Ct. 1759, 446 U.S. 420, 64 L.Ed.2d 398.

Death penalty. Imposition as denial of due process where imposed upon conviction of same offense as that relied upon to find necessary statutory aggravating circumstances, see Presnell v. Georgia, 1978, 439 U.S. 14, 58 L.Ed.2d 207, 99 S.Ct. 235.

Death penalty. Mitigating circumstances, see Eddings v. Oklahoma (1982) 102 S.Ct. 869.

APPENDIX D

THE COURT: Mr. Zaragoza, at this time I am going to render on the record a special verdict required by the statutes in this case. The law requires that I make a finding of the existence or non-existence of aggravating circumstances and mitigating circumstances. A.R.S. 13-703(F) sets forth aggravating circumstances which may be considered in a first degree murder case.

The first of such circumstances is as follows:

"The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was impossible."

I find that aggravating circumstances does not exist in this case.

The second circumstance is that:

"The defendant was previously convicted of a felony in the United States involving the use or threatened violence on another person."

I find that aggravating circumstance does exist in this case. Specifically, on October 17, 1980, you were convicted, in CR-115197, of the crime of aggravated assault, a felony. The conviction was in the Superior Court, Maricopa County. Based upon the evidence presented to me today, I find

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beyond a reasonable doubt that that offense involved the actual use of violence on another person. Specifically, you kicked the victim in the head while the victim was either asleep or unconscious on the ground. As a result of being kicked in the head, the victim's head was injured, he bled profusely.

Also, July 27, 1970, in CR-101055, you were convicted of the crime of assault with a deadly weapon, a felony. That conviction was also in Superior Court, Maricopa County. That offense involved the actual use of violence on another person. Specifically, you struck the victim in the head with either one, through as many as four wine bottles, depending on whether or not Mr. Davis' present testimony is correct, or testimony of that statement he gave to the police but, in any event, clearly at least one bottle was used to strike the victim in the head. The force was strong enough that it resulted in the bottle being broken. It was used to strike the victim's head, the victim's head was lacerated. That offense also involved the threat of violence against another person. Specifically, in that case you also threatened to kill the victim in that case. There was evidence presented in the hearing concerning robbery or theft. The record will show clearly I am not considering any evidence concerning robbery or theft as an aggravating circumstance. I do not feel that there was sufficient evidence presented, nor do I

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find that would fall within this aggravating circumstance, but I am relying on the use and threat of use of force and violence against the victim in that case.

The third aggravating circumstance is that:

"In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense."

I find that aggravating circumstances does not exist.

The fourth circumstance is that:

"The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value."

I find that aggravating circumstance does not exist in this case.

The fifth circumstance is that:

"The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value."

I find that aggravating circumstance does not exist in this case, there is simply not sufficient evidence to establish that.

The sixth aggravating circumstance is that:

"The defendant committed the offense in an especially heinous, cruel, or depraved manner."

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I find, in part, that that aggravating circumstance does exist in this case.

As to whether or not the offense was committed in an especially cruel manner, I do not find that that aggravating circumstance exists in this case. Such finding seems to be to be contrary to common sense. However, it is possible after hearing testimony at the trial and after reading the deposition of Dr. Jarvis, that the victim in this case was rendered unconscious by the first blow that was struck by you. Therefore, if she remained unconscious through the remainder of events, she would not have suffered. Therefore, the State has not proven she suffered any pain if she were rendered unconscious immediately. The reason I say that that seems to run contrary to common sense to me is that according to Dr. Jarvis, the wounds themselves were of a superficial nature, which my guess would be did not render her unconscious.

Dr. Jarvis also testified there were defensive wounds on the back of the hands which in his speculation were caused when she raised her hands in defense of the blows that were being struck to her head which, if that were the case, of course she was not unconscious at the time, but that's basically an educated guess on the part of the doctor. I cannot find beyond a reasonable doubt that the State has established this offense was committed in a cruel manner. Therefore, I do not find that aggravating circumstance exists.

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However, I do find the State has established beyond a reasonable doubt that the offense was committed in an especially heinous and depraved manner. This murder was by definition the most senseless murder I have heard in quite awhile. This lady was 78 years old. She had limited mental capabilities. The evidence at trial showed she was easily manipulated by others. She was not physically strong. This woman was at your mercy completely during the events of this matter. There was absolutely no reason or justification for killing her. You could have accomplished whatever other goals you had in mind, including sexual assault and anything else, not killed this woman. It was by definition a senseless killing.

I think by sexually assaulting then killing a 78-year old woman of this type by striking her in the head with bottles and letting her lie there and bleed to death shows to me a shockingly evil and depraved state of mind. For that reason, I find that aggravating circumstance exists.

I might also add that if it is true that the lady was rendered unconscious by the initial blow, therefore didn't suffer, therefore, this can't be called a cruel killing under that manner which that word is defined by the cases, that would add to my finding that it was a depraved killing because if she was unconscious after the first blow, then you repeatedly assaulted her while she was unconscious, that

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would in my mind also add depravity to what occurred in this case.

The seventh aggravating circumstance is that:

"The defendant committed the offense while in the custody of the Department of Corrections, a law enforcement agency or County or City jail." I find that aggravating circumstance does not exist in this case.

Turning then, sir, to the mitigating circumstances which are set forth in part by 13-703(G), although certainly not limited to those set forth in this statute, the first circumstance is that:

"The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law were significantly impaired, but not so impaired as to constitute a defense to prosecution."

I find that mitigating circumstance does not exist in this case. While there was some evidence at trial that you had been drinking alcohol, there was simply no evidence presented you were intoxicated, clearly no evidence presented that even if you had been drinking alcohol, that your capacity to appreciate the wrongfulness of your conduct or conform your conduct to the requirements of law were significantly impaired, or impaired at all. I do not find that mitigating circumstance exists.

The second mitigating circumstance is that:

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"The defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution."

I find that mitigating circumstances does not exist in this case.

The third circumstance is that:

"The defendant was legally accountable for the conduct of another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution."

I find that mitigating circumstance does not exist.

The fourth mitigating circumstance is that:

"The defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person."

I find that that mitigating circumstances doesnot exist in this case. Under the facts as I have determined them to be, heard them presented, when you take into consideration who the victim was, her age, manner which she was struck, the fact she was left to bleed to death on the ground, seems to be clear that it was reasonably foreseeable that your actions would cause her death or would certainly create a grave risk of causing her death. I just can't accept the arguments that were put forth on your behalf that that mitigating

SUPERIOR COURT
PHOENIX ARIZONA

circumstance is present.

The fifth mitigating circumstance is:

"The defendant's age."

You are 35 years of age. I can find nothing in your age that is a mitigating circumstance. Therefore, I find that circumstance does not exist.

The only other mitigating, or possible mitigating circumstance I am aware of in this case is you were convicted of first degree murder as a result of the felony murder rule. The State failed to prove that this was a premeditated killing. You were not convicted of premeditated killing.

Considering the evidence and the nature in which this offense was committed, it appears clear, first of all, that what occurred was not the result of an accident, was not the result of an unanticipated involvement of a third party such as is sometimes the case where the felony murder rule is invoked.

Under the circumstances of this case, I cannot find that the fact this is a felony murder case in any way reduces the cruel or depraved manner in which the death was inflicted.

There is not as yet, although maybe there will be in the future, per se a rule that says the death penalty cannot be inflicted as a result of a felony murder conviction. I do not find under the circumstances of this case, that the

SUPERIOR COURT
PHOENIX ARIZONA

fact that this is a felony murder conviction is a mitigating circumstance.

Mr. Zaragoza, I find that there are no mitigating circumstances. I find that even considering the argument for mitigation, those arguments are not sufficiently substantial to call for leniency in this case.

It is therefore ordered, sir, that for the crime of first degree murder you are sentenced to death in the manner prescribed by law.

This judgment shall be the authority for the director of the Department of Corrections to carry out sentence just imposed. It will also be the authority for the sheriff of Maricopa County to transport you to the Department of Corrections.

You are advised, sir, in this case as well, you have the right to appeal.

If you wish to appeal, you have the right to be represented by an attorney at that appeal. If you cannot afford an attorney, one will be appointed for you. If you cannot afford the necessary documents and transcripts for an appeal, those will be furnished to you at county expense.

If you wish to appeal this case, you must file a written notice of appeal within 20 days from today. If you do not do that, sir, you will lose your right to appeal: do you understand that?

SUPERIOR COURT
PHOENIX ARIZONA

DEFENDANT ZARAGOZA: Yeah.

THE COURT: There are no matters to be dismissed, no bond in this case.

The Clerk is ordered to comply with Rule 26.10(B)(5).

At this time you are remanded to the custody of the sheriff of this county to carry out sentence just imposed.

Thank you.

(Whereupon, the proceedings were concluded.)

SUPERIOR COURT
PHOENIX ARIZONA

CERTIFICATE

I HEREBY CERTIFY that I was present on June 16, 1981, and October 26, 1981, at the proceedings of the above-entitled and numbered causes, No. CR-119984 and CR-115197; that I made a shorthand record of all oral matters had and adduced at said proceedings; that thereafter the transcript of proceedings, pages 1-49, inclusive, were reduced to typewriting under my direction; and that the material contained herein is a true and accurate accounting of said matter, all to the best of my skill and ability.

Roy W. Schiesser
Official Court Reporter

SUPERIOR COURT
PHOENIX ARIZONA

No. _____

IN THE SUPREME COURT
OF THE
UNITED STATES

October Term, 1982

82-6597

RECEIVED
APR 21 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
APR 18 1983
Alexander L. Stevas, Clerk

RUBEN C. ZARAGOZA,

Petitioner,

- vs. -

STATE OF ARIZONA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF ARIZONA

MOTION FOR LEAVE TO PROCEED IN
FORMA PAUPERIS

Petitioner, RUBEN C. ZARAGOZA, pursuant to Rule 46, Supreme Court Rules asks leave to file the attached petition for a writ of certiorari to the Supreme Court of the State of Arizona without pre-payment of costs and to proceed in forma pauperis. The Petitioner was represented by the Maricopa County Public Defender's Office, of which undersigned is a member, in the Superior Court of Maricopa County and on appeal to the Supreme Court of the State of Arizona.

Respectfully submitted this 18th day of April, 1983.

ROSS P. LEE
Maricopa County Public Defender

By Michael G. Sullivan
MICHAEL G. SULLIVAN
Deputy Public Defender
132 South Central, 2nd Floor
Phoenix, Arizona 85004
Attorney for Petitioner

AFFIDAVIT

I, MICHAEL G. SULLIVAN, being first duly sworn upon my oath depose and state that I am the appointed counsel for the Petitioner in the above-entitled

case; that in support of this motion to proceed without being required to prepay fees, costs, or give security therefore, I state that Petitioner was allowed to proceed in Forma Pauperis in both the Superior Court and the Supreme Court of the State of Arizona. That Petitioner is currently unemployed and has been incarcerated by the State of Arizona since 1981 in Cell Block No. 6, Arizona State Prison, (death row).

I understand that a false statement in this affidavit will subject me to penalties for perjury.

Michael G. Sullivan
MICHAEL G. SULLIVAN

STATE OF ARIZONA,)
) SS.
County of Maricopa,)

SUBSCRIBED AND SWORN to before me this 18th day of April, 1983.

Beverly Bitzimer
Notary Public

My Commission Expires:

My Commission Expires June 25, 1983

FORM 4 AFFIDAVIT REQUESTED

No. _____

IN THE SUPREME COURT
OF THE
UNITED STATES

October Term, 1982

RUBEN C. ZARAGOZA,

Petitioner,

- vs. -

STATE OF ARIZONA,

Respondent.

RECEIVED
APR 21 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF ARIZONA

MOTION FOR APPOINTMENT OF COUNSEL

Petitioner, RUBEN C. ZARAGOZA, who has filed the attached Petition for Writ of Certiorari to the Supreme Court of the State of Arizona and the attached Motion for Leave to Proceed in Forma Pauperis, moves this Court to enter an order appointing undersigned counsel to represent Petitioner in all further proceedings in this matter. Rule 46.6, Rules of the Supreme Court, 28 U.S.C. Undersigned counsel has represented the Petitioner in the Arizona courts in the litigation which has given rise to the accompanying Petition for Writ of Certiorari.

ROSS P. LEE
Maricopa County Public Defender

By Michael G. Sullivan
MICHAEL G. SULLIVAN
Deputy Public Defender
132 South Central, 2nd Floor
Phoenix, Arizona 85004
Attorney for Petitioner

OFFICE OF THE PUBLIC DEFENDER

MARICOPA COUNTY
Luhrs Central Bldg.
132 S. Central Avenue, 2nd Floor
Phoenix, Arizona 85004

ROSS P. LEE
PUBLIC DEFENDER

BEDFORD DOUGLASS, JR.
ASSISTANT PUBLIC DEFENDER

602-258-7711

May 2, 1983

82-6597

RECEIVED
MAY 5 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Ms. Margaret H. McFarland
Office of the Clerk of the
United States Supreme Court
1 First St., N.E.
Washington, D.C. 20543

Dear Ms. McFarland:

Enclosed please find the Certificate of Service and Affidvait of Filing signed by Mr. John Foreman. I was unable to obtain Mr. Zaragoza's signature on the Affidavit of Indigency when I visited him at the Arizona State Prison on April 29, 1983. Mr. Zaragoza appeared to be somewhat confused and depressed at the time I talked to him. He indicated that he could not read and write and that he did not want me to read the Affidavit to him. I found out from talking to Mr. Zaragoza's counselor that Mr. Zaragoza has refused to talk to the prison psychiatrist as well as his prison counselor. I am in the process of trying to find someone who can explain the Petition and Affidavit of Inidigency to Mr. Zaragoza. At this point in time there is some question in my mind as to whether or not Mr. Zaragoza fully understands the Affidavit and the Petition. I understand that this Court's rules permit a case to be docketed on the basis of supplemental documents. (Stern and Gressman, Supreme Court Practice, 5th Edition, 1978, p. 560). I am enclosing copies of the documents whereby petitioner indicated his indigency and requested the appointment of our office and the granting of that request. I hope the Court will docket the case and grant my Motion to Proceed in Forma Pauperis on the basis of the previously filed Affidavit and the explanation and supplemental documents contained with this letter.

Sincerely,

ROSS P. LEE
Public Defender

Michael P. Sullivan

MICHAEL G. SULLIVAN
Deputy Public Defender

MGS:gc
Enclosures

82-6597

Defendant Spouse (Employer):

MAY 5 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Pay Schedule (per month)

Net:Pay: (Amount taken home)

payroll deductions for savings, stocks, etc.

Other forms of Income:

unemployment comp., welfare, disability, veterans, soc. sec., workmens' comp., retirement, accident bens., interest, dividents, child support, allotment checks, alimony, other,

Total Income Per Month 113

Total Combined Available Assets:

Cash: You or spouse at home: -0-
jail property

Savings Account or with a Credit Unions: /
Checking account:
Stocks or Bonds:
Branch

Money owed to you or your spouse:
Other
Total -0-

Additional Assets: (car, trailer, motorcycle, boat, tr ck, other)

	value	amount owed
description:		

Property: (Your home, land, buildings, other)

	value	amount owed
location:		
location:		

Name of property owner:
Estimated value of furniture, t.v., stereo, tools, appliances, jewelry, and other possessions:
Amount still owed on possessions:

REMARKS:

Expenses (per month)

Rent or House Payments:	
Utilities: (gas, elect., phone, water, garbage,)	113
Food:	
Credit Card and Charge Account Payments:	
Loans:	
Car Payments:	
Union Dues:	
Medical Care	
Child Support:	
Car Insurance, gas, maintence:	
Baby-sitter:	
Other:	
Total Monthly Expenses:	

Other debts that you pay monthly or otherwise:

	total owed	how often
debt:		
debt:		
debt:		
debt:		
Total debts owed:		

Can you afford to pay for a lawyer to help you with this case? ___Yes ___No

Do you have a lawyer to help you with this case? ___Yes ___No Who:

Have you in the past had a lawyer that you had to pay to represent you? ___No ___Yes Who:

Do you want the Court to appoint a lawyer (Public Defender) to help you? ___Yes ___No

How much cash could you pay as a down payment on a lawyer's fee? $

How much cash could you pay each week, starting next week, for your lawyer's fee? $ per week

Oath under penalty of perjury:
Whether or not I am applying herein for services of the public defender, or other court appointed attorney, I have truthfully given the information which appears in this statement. I have not knowingly concealed, or in any way misrepresented my financial resources. I am aware that I can be held in contempt of court, or prosecuted for perjury if I have made any false statements or misrepresentation or concealment, and can be prosecuted for theft if I obtain the services of the public defender or a court appointed attorney by means of false statement, misrepresentation, or concealment, or if I continue to accept such services after my financial condition has changed without notifying the public defender or my court appointed attorney and that in any such case this application may be used against me. If the public defender or a court appointed attorney accepts my case, I will notify him of any change in my financial resources, including release on bail or on my own recognisance, employment, cash income, or any other items listed above.

I also give my permission to the court to contact anyone named above or any agency or corporation with regard to their investigation of the statements I made.

I hereby make these representations under Penalty of Perjury.

Date: 5-21-81

Defendant's Signature

72

Witnessed by:

IN THE Justice COURT

STATE OF ARIZONA — COUNTY OF MARICOPA

(1998C)

STATE OF ARIZONA

vs.

Ruben Zaragoza
Defendant

BOOKING # 540617

CASE #

SOCIAL SECURITY #

ORDER REGARDING COUNSEL AND REIMBURSEMENT

FILED
1981 JUN 10 PM 4:24
WILSON G. PALMER, CLERK
BY: Dorothy Quinn DEP.

The Court makes the findings and orders as marked below:

☐ 1. Defendant has retained a lawyer.

☐ 2. Defendant is not indigent and is financially able to pay for the services of a lawyer. (WARNING: If you appear at the next hearing without a lawyer, the hearing may still proceed as scheduled.)

☐ 3. Defendant has advised the Court that Defendant can and will hire a lawyer. If Defendant is not able to hire a lawyer, IT IS ORDERED DEFENDANT MUST APPEAR IN PERSON BEFORE THE ABOVE COURT BY 4:00 P.M., on _____, _____, at _____, and advise the Court of that fact. (WARNING: If you appear at the next hearing without a lawyer, the hearing may still proceed as scheduled.)

☒ 4. The Court finds that Defendant is indigent and IT IS ORDERED that the Maricopa County Public Defender is appointed as lawyer for Defendant. IT IS FURTHER ORDERED that YOU, the DEFENDANT, go to the Office of the Maricopa County Public Defender, 132 South Central, Phoenix, Arizona, Second Floor, Monday through Friday, from 8 A.M. to 4:30 P.M., except holidays, to discuss your case. DO THIS AS SOON AS POSSIBLE AFTER YOUR RELEASE FROM JAIL. (If you are not released before your next hearing, a Public Defender will contact you.)

☐ 5. IT IS FURTHER ORDERED that YOU, the DEFENDANT, shall pay toward the cost of your lawyer the sum of $ _____ every week starting next week until further order of the Court.

Make all payments in cash, money order or certified check payable to the Clerk of the Superior Court. Take or mail the payment to the Clerk of the Superior Court, 201 West Jefferson, Phoenix, Arizona 85003. DO NOT MAIL CASH! If you pay with cash, do so only in person on a Tuesday, Wednesday, or Thursday. Money orders and checks may be mailed any day of the week. When paying by mail, be sure that your name and CASE NUMBER are shown on the money order and check. (WARNING: Your failure to pay as ordered may result in your being charged with contempt of court.)

☐ 6. At this time Defendant is not required to pay toward the cost of the Public Defender or Court appointed attorney.

☐ 7. The Defendant is eligible for a MIDAS lawyer and is referred to the lawyer named below.

☐ 8. Defendant is indigent and the lawyer named below is appointed for Defendant.

☐ 9. IT IS FURTHER ORDERED that YOU, the DEFENDANT, shall contact the following lawyer to discuss your case. Do this as soon as possible after your release from jail. (If you are not released before your next hearing, the lawyer will contact you.)

Attorney's Name _____

Address _____

City _____, Arizona

Phone _____

5-27-81
5/25/81
Date _____, 19____

Judge, Magistrate, Commissioner

(5)

5889-007

1-File 2-Clerk 3-Defendant

Office - Supreme Court, U.S.
FILED
MAY 19 1983

NO. 82-6597

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

RUBEN C. ZARAGOZA,

Petitioner,

-vs-

STATE OF ARIZONA,

Respondent,

ON WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

ROBERT K. CORBIN
Attorney General of
the State of Arizona

WILLIAM J. SCHAFER III
Chief Counsel
Criminal Division

CRANE McCLENNEN
Assistant Attorney General
Department of Law
1275 W. Washington, 2nd Floor
Phoenix, Arizona 85007
Telephone: (602)255-4686

Attorneys for RESPONDENT

QUESTIONS PRESENTED FOR REVIEW

1. Did the evidence show beyond a reasonable doubt that petitioner killed the victim, and is a sentence of death permissible in such a case?

2. Has the Arizona Supreme Court construed the phrase "especially heinous, cruel or depraved" in such a way so that it gives proper guidance to the sentencing authority?

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STATEMENT OF THE CASE

Winifred Duggan, the victim in this case, was a 78-year-old woman. A lobotomy had been performed on her sometime in the 1930's, and she had limited mental capabilities and was easy to manipulate.

At about 8:30 or 8:45 on the evening of May 26, 1981, petitioner and Winifred Duggan were seen in a liquor store near Sixth Avenue and Van Buren in Phoenix. Winifred appeared to be unaware of where she was, and petitioner was controlling her. Petitioner had Winifred's purse and refused to give it to her when she reached for it. Petitioner took money out of the purse and bought a can of beer and a pint bottle of white port wine. They then left the store.

Some time between 9:00 and 10:00 that same evening, petitioner and Winifred approached some people who were drinking beer on the porch of their apartments on Sixth Avenue. Winifred appeared to be nervous or scared, and petitioner spoke for her whenever she was spoken to. Petitioner and Winifred remained there for 15 to 20 minutes. During that time both of them were seen drinking beer.

At 11:10 that night, petitioner was seen in the alley behind the same apartments on Sixth Avenue. He climbed up on a metal utility box and pulled some clothes off the top of the building across the alley from the apartments. He then threw several objects onto the roof of that building.

The following morning, Winifred Duggan's body was found in the alley a short distance from the apartments. The body was naked except for a bra (which had been pushed up exposing her breasts) and a pair of sandals. Winifred Duggan had several head wounds caused by blows from some blunt object. She bled to death as a result of those wounds. She also had a bruise at the back edge of her vagina that was consistent with penetration by a penis or finger. A foreign pubic hair that matched appellant's was found meshed with the victim's own public hair.

Police officers found some bloody clothes, two bloody beer bottles, and a bloody white port wine bottle on the roof of the building across from the apartments on Sixth Avenue. The bottles also had some white hair stuck to them, and some identifiable latent fingerprints on them. The blood and hair on the bottles matched the victim's, and the prints matched petitioner's. Petitioner's fingerprint was also found on one of three bloody paper bags found near the body.

Petitioner was arrested later that morning. He admitted having been with the victim the night before but denied killing her. He was charged with first degree premeditated murder and first degree felony murder alleging that he killed the victim while committing or attempting to commit robbery or sexual assault. At the close of the evidence at trial, the court directed a verdict of acquittal on the premediated murder charge.

On September 28, 1981, a jury found petitioner guilty of first degree murder in violaton of Ariz.Rev.Stat.Ann. § 13-1105(A)(2). An aggravation-mitigation hearing was set for October 26, 1981. Because petitioner on probation for a prior aggravated assault conviction at the time of the murder, the disposition hearing in connection with the probation revocation was also set for October 26, 1981. At the hearing on October 26, the trial court revoked petitioner's probation and sentenced him to 1.875 years in prison for aggravated assault. The court then sentenced petitioner to death for the first degree murder. Appeal was automatic. The Arizona Supreme Court affirmed the judgment and sentence. State v. Zaragoza, ___ Ariz. ___, 659 P.2d 22 (1983). This petition for certiorari followed.

JURISDICITION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(3).

ARGUMENTS

I

BECAUSE THE EVIDENCE SHOWS BEYOND A REASONABLE DOUBT THAT PETITIONER KILLED THE VICTIM, THE SENTENCE OF DEATH IS PROPER.

Petitioner contends that his sentence of death is unconstitutional because the state failed to prove that he intended to kill the victim. For this he relies upon Enmund v. Florida, ___ U.S. ___, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). That case contains the following language:

> It was thus irrelevant [under Florida law] to Enmund's challenge to the death sentence that he did not himself kill and was not present at the killings; also beside the point was whether he intended that the Kerseys be killed or anticipated that lethal force would or might be used if necessary to effectuate the robbery or a safe escape. We have concluded that imposition of the death penalty in these circumstances is inconsistent with the Eighth and Fourteenth Amendments.

102 S.Ct. at 3372, 73 L.Ed.2d at 1146 (emphasis added).

> While the current legislative judgment with respect to imposition of the death penalty where a defendant did not take life, attempt to take it, or intend to take life is neither "wholly unanimous among state legislatures," . . . .

102 S.Ct. at 3374, 73 L.Ed.2d at 1149 (emphasis added).

> At issue is the number of states which authorize the death penalty where the defendant did not kill, attempt to kill, or intend to kill.

102 S.Ct. at 3374 n.15, 73 L.Ed.2d at 1149 n.15 (emphasis added).

> The fact remains that we are not aware of a single person convicted of felony murder over the past quarter century who did not kill or attempt to kill, and did not intend the death of the victim, who has been executed, and that only three persons in that category are presently sentenced to die.

102 S.Ct. at 3376, 73 L.Ed.2d at 1151 (emphasis added).

> Although the judgments of legislatures, juries and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty on one such as Enmund who aids and abets a felony in the

> course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed. We have concluded, along with most legislatures and juries, that it does not.

102 S.Ct. at 3376-77, 73 L.Ed.2d at 1151 (emphasis added).

> We are quite unconvinced, however, that the threat that the death penalty will be imposed for murder will measurably deter one who does not kill and has no intention or purpose that life will be taken. Instead, it seems likely that "capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation," for if a person does not intend that life be taken or contemplate that lethal force will be employed by others, the possibility that the death penalty will be imposed for vicarious felony murder will not "enter into the cold calculus that precedes the decision to act."

102 S.Ct. at 3377-78, 73 L.Ed.2d at 1152-53 (emphasis added, citations omitted).

> Because the Florida Supreme Court affirmed the death penalty in this case in the absence of proof that Enmund killed or attempted to kill, and regardless of whether Enmund intended or contemplated that life would be taken, we reverse the judgment upholding the death penalty and remand for further proceedings not inconsistent with this opinion.

102 S.Ct. at 3379, 73 L.Ed.2d at 1154 (emphasis added). It seems from the above language that a sentence of death is proper if the defendant (1) killed, or (2) attempted to kill, or (3) intended to kill, or (4) contemplated that life would be taken, or (5) intended that lethal force

would be used, or (6) contemplated that lethal force would or might be used by others.

Petitioner was the only person on trial for the murder of Winifred Duggan. The jury verdict of guilty of first-degree murder means that the state proved beyond a reasonable doubt that petitioner killed the victim. The sentence of death is therefore proper under Enmund v. Florida, supra.

Petitioner further contends that the state placed upon him the burden of proving that he did not intend to kill the victim. Under the Arizona statute, once the defendant has been found guilty, and once the state has proved beyond a reasonable doubt the existence of one or more aggravating circumstances, then the defendant has the burden of proving mitigating circumstances. Ariz.Rev.Stat.Ann. § 13-703(C). The language quoted by petitioner is the statement by the Arizona Supreme Court that petitioner failed to meet his burden of showing that submitting the case to the jury under a felony-murder theory was a mitigating circumstance. State v. Zaragoza, supra, ___ Ariz. at ___, 659 P.2d at 29. This Court has never held that it is unconstitutional to place upon the defendant the burden of establishing mitigating circumstances, and the United States District Court for the District of Arizona has approved of such a system. Richmond v. Cardwell, 450 F.Supp. 519, 524-25 (D.Ariz. 1978).

II

THE ARIZONA SUPREME COURT HAS PROPERLY CONSTRUED THE PHPASE "ESPECIALLY HEINOUS, CRUEL OR DEPRAVED."

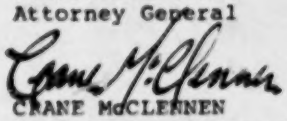
Petitioner contends that the phrase "especially heinous, cruel or depraved" as use as an aggravating circumstance in Ariz.Rev.Stat.Ann. § 13-703(F)(6) is unconstitutionally vague and overbroad. In Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), and Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), this Court held that similar language is permissible for use as an aggravating circumstance provided that it is properly construed so that it may give adequate guidance to the sentencing authority. Gregg v. Georgia, supra, 428 U.S. at 201; Proffitt v. Florida, supra, 428 U.S. at 255-56. The Arizona Supreme Court has issued numerous opinions construing this phrase. See Exhibit "A." In Arizona, sentencing is done by the trial judge. Ariz.Rev.Stat.Ann. § 13-703(B),(E). A trial judge who must determine whether the killing is "especially heinous, cruel or depraved" can read these cases and use them for guidance. Because this will sufficiently direct and limit the discretion of the sentencing authority, it satisfies the requirements of Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) and Gregg v. Georgia, supra.

CONCLUSION

Because petitioner has failed to show a violation of any constitutional right, this Court should deny the Petiton for Certiorari.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General



CRANE McCLENNEN
Assistant Attorney General

Attorneys for RESPONDENT

AFFIDAVIT

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

CRANE McCLENNEN, being first duly sworn upon oath, deposes and says:

That he served the attorney for the respondent in the foregoing case by forwarding one (1) copy of RESPONSE TO PETITION FOR WRIT OF CERTIORARI, in a sealed envelope, first class postage prepaid, and deposited same in the United States mail, addressed to:

MICHAEL G. SULLIVAN
Deputy Public Defender
132 South Central, 2nd Floor
Phoenix, Arizona 85003
Attorney for PETITIONER

this 16th day of May, 1983.

Crane McClennen
CRANE McCLENNEN

SUBSCRIBED AND SWORN to before me this 16th day of May, 1983.

Elizabeth J. Bendes
NOTARY PUBLIC

My Commission Expires:

July 17, 1986

CR31-247
1945D:bb

EXHIBIT "A"

CASES CONSTRUING THE PHRASE
"HEINOUS, CRUEL OR DEPRAVED"

State v. Gerlaugh, ___ Ariz. ___, ___, 659 P.2d 642, 643-44 (1983).

State v. Zaragoza, ___ Ariz. ___, ___, 659 P.2d 22, 28-29 (1983).

State v. Gretzler, ___ Ariz. ___, ___, 569 P.2d 1, 9-12 (1983).

State v. Woratzeck, ___ Ariz. ___, ___, 657 P.2d 865, 870 (1982).

State v. Poland, 132 Ariz. 269, 285, 645 P.2d 784, 800 (1982).

State v. Blazak, 131 Ariz. 598, 604, 643 P.2d 694, 700, cert. denied, ___ U.S. ___, 103 S.Ct. 189, 74 L.Ed.2d 149 (1982).

State v. Ortiz, 131 Ariz. 195, 206, 639 P.2d 1020, 1031 (1981), cert. denied, ___ U.S. ___, 102 S.Ct. 2259, 72 L.Ed.2d 863 (1982).

State v. Tison (Ray), 129 Ariz. 546, 555, 633 P.2d 355, 364 (1981), cert. denied, ___ U.S. ___, 102 S.Ct. 180, 74 L.Ed.2d 147 (1981).

State v. Tison (Rick), 129 Ariz. 526, 542-44, 633 P.2d 335, 351-53, cert. denied, 454 U.S. 848 (1981).

State v. Vickers, 129 Ariz. 506, 515, 633 P.2d 315, 324 (1981).

State v. Bishop, 127 Ariz. 531, 534, 622 P.2d 478, 481 (1980).

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